No. 05-840

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

DENNIS L. RODRIGUEZ,
Petitioner,

Vs.

COMMOMWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Allen C. Welch, Esquire
Counsel of Record for Petitioner
1101 North Front Street
Harrisburg, PA 17102
Telephone: (717)-350-1002

QUESTION PRESENTED FOR REVIEW

I. WAS THE PETITIONER DENIED DUE PROCESS OF LAW, AS GUARANTEED HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, WHEN THE RESPONDENT COMMONWEALTH'S AGENCY FAILED TO OFFER INTO EVIDENCE AGAINST HIM AT HEARING *DE NOVO* ANY EVIDENCE OF THE CONVICTION WHICH TRIGGERED THE ENHANCED PUNISHMENT (EXTENDED OPERATOR'S LICENSE REVOCATION) WHICH WAS IMPOSED UPON HIM?

LIST OF PARTIES TO THIS PROCEEDING

Petitioner Dennis L. Rodriguez,
By and through Counsel of Record:
Allen C. Welch, Esquire
1101 N. Front Street
Harrisburg, PA 17102
Phone: (717)-234-4583

Respondent Commonwealth of Pennsylvania,
Department of Transportation,
By counsel for the agency:
Andrew S. Gordon, Esquire
Chief Counsel
Riverfront Office Center, Third Floor
1101 South Front Street
Harrisburg, Pa 17104-2516

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REFERENCE TO OPINIONS BELOW

There have been two opinions delivered in this case, and neither has been published.

The unpublished trial court Opinion of the Honorable Bruce F. Bratton, Judge of the Court of Common Pleas of Dauphin County, Pennsylvania, dated March 29, 2004, is reproduced in the Appendix hereto at page 24.

The majority and dissenting Opinions of the Commonwealth Court of Pennsylvania, also unpublished (table notation of the entry of these Opinions is reported at 862 A.2d 757 (2004)(Table)), are reproduced in the Appendix hereto at page 11.

The per curium Order denying Allowance of Appeal entered by the Supreme Court of Pennsylvania is referenced at 882 A.2d 1007 (2005)(Table) and is also reproduced in the Appendix hereto at page 10.

CONCISE STATEMENT OF THE BASIS OF JURISDICTION

This petition for a writ of certiorari is from the denial of a petition for allowance of appeal by the Supreme Court of Pennsylvania on September 14, 2005, which effectively affirmed Petitioner's rejection of his appeal from a suspension of his driving privileges by Respondent state agency. It claims that he was denied due process of law. As such, this Honorable Court has jurisdiction pursuant to 28 U.S.C. 1257 (a) and 28 U.S.C. 1651.

CONSTITUTIONAL PROVISIONS AND STAUTES

Fifth Amendment to the United States Constitution

"No person shall be . . .deprived of life, liberty, or property, without due process of law [.]"

Fourteenth Amendment to the United States Constitution

"Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This Petition arises from the revocation[1] of Petitioner's driving privileges for a five-year period pursuant to Pennsylvania's Habitual Offender statute, found in the Pennsylvania Vehicle Code, 75 Pa. C.S.A. 1542[2]. That statute provides that any person found to be in violation of any of a number of enumerated offenses three times within a five-year period be subject to an extended period of revocation of their operating privileges for a five-year period. Driving Under the Influence[3] is one of those enumerated offenses.

Petitioner Rodriguez was arrested for DUI on February 8, 1997, July 4, 1997, and July 6, 2001. As such he "committed" the acts necessary to be adjudicated a "habitual offender." However, the last offense, was the subject of dispute because of the failure of the Respondent to properly present to the trial court evidence of this third offense; in fact, petitioner had entered a plea of guilty to that offense on April 8, 2002, but was allowed to withdraw that plea on August 29, 2002. He later, on January 13, 2003, entered another plea of guilt to the offense.

The procedure for the imposition of such a suspension is written notice from the Respondent, from which there is an opportunity to appeal that action to the Court of Common Pleas, and this was done in a timely fashion. That action results in the first formal opportunity to be heard in such cases, generating a hearing de novo whereat the Respondent bears the burden of proving, by presentation of competent evidence, that the target of the suspension does, in fact, have the requisite violations to support the imposition of the enhanced suspension penalty. This

---

[1] There is confusion regarding the actual action taken by the Department. In fact Petitioner's operating privileges were revoked for five years, rather than suspended as is often stated by the courts in their opinions. For purposes of this Petition the distinction means noting.

[2] 75 Pa. C.S.A. 1542 provides, in part, that a "habitual offender" "shall be any person whose driving record, as maintained in the Department, shows that such person has accumulated a requisite number of convictions . . . committed . . . within any period of five years . . ."

[3] Formerly 75 Pa. C.S.A. 1542, now 75 Pa. C.S.A. 3802.

is most easily and commonly done by presenting to the Court a certified copy of the driving record of the subject motorist; that evidence is suggested by the language of the statute providing that the convictions appear in the "driving record, as maintained in the Department."

However, at hearing before the Court of Common Pleas of Dauphin County, on his appeal from the suspension, the Department offered as evidence a certified copy of the driving record of the Petitioner that was erroneous. It reflected the entry of the August 29, 2002, plea to the third DUI offense which plea was, in fact, withdrawn. Simply put, the driving record offered as evidence against Petitioner showed only two offenses for which he was convicted. There was nothing presented by Respondent to evidence the January 13, 2003, plea of guilty.

The right to due process of law is guaranteed by the Fifth Amendment of the Constitution, and further guaranteed in this state action by the Fourteenth Amendment.

The Department bears the burden of proving the existence of the requisite three convictions within five years to allow the mandated suspension to take effect; this is the simple process due the Petitioner in this matter.

Yet the Court of Common Pleas of Dauphin County, and the Commonwealth Court of Pennsylvania, both failed to grasp this argument, with the notable exception of Senior Commonwealth Court Judge James R. Kelley, who, in dissent, took exception with the other two judges of the Court for failing to see the simplicity of it.

Petitioner asked the Supreme Court of Pennsylvania to hear further appeal, and they declined on September 14, 2005; this timely Petition followed.

ARGUMENT

The essence of the argument in this case can be very briefly summarized as follows: Petitioner had two DUI convictions in a brief period of time, and a third would result in an enhanced five-year revocation of his driving privilege. He received the third on July 6, 2001, and entered a plea of guilt to that offense on April 8, 2002, but then was allowed to withdraw his plea. Later, on January 13, 2003, he entered another plea of guilt to that charge. As a result, Pennsylvania's Department of Transportation revoked his driving privileges, and he appealed.

At hearing *de novo* in the trial court, Respondent failed to produce any evidence of the January 13, 2003 conviction. He appealed that decision to Commonwealth Court of Pennsylvania, where a panel of three judges ruled, 2-1, to affirm the trial court.

The argument is whether or not the certified driving record entered into evidence by Respondent at the hearing *de novo* was merely a minor error, or whether it was a defect so great as to deprive Petitioner of due process as guaranteed by the Fifth Amendment.

The argument herein was well stated by Senior Judge Kelley of the Commonwealth Court of Pennsylvania, in footnote 9 of his dissent, contained in the Appendix hereto. It follows in loosely paraphrased form:

The Majority of the Commonwealth Court panel found that the Respondent Department's presentation of a certified driving record containing the incorrect date of conviction was just a minor error which would not justify the overturning of Petitioner's license revocation. However, in doing so, the majority failed to grasp what had truly and fully occurred: that the Department had totally failed to offer the correct notice of revocation underlying the appeal itself, nor any evidence of the conviction supporting that revocation. The certified copy of the notice of revocation of May 3, 2002, and certified copy of the conviction of April 8, 2002, that were offered by the Department at the hearing were, at that point, null and void as Rodriguez had

withdrawn his guilty plea, entered a new guilty plea on January 13, 2003, and the Department had issued a new revocation notice of July 24, 2003 which was the subject of the appeal. **Such an omission on the Department's part implicates the fundamental guarantee of due process and can never be deemed to be a "minor error**." See, e.g., Dunn v. Department of Transportation, 819 A.2d 189, 192-193 (Pa. Cmwlth. 2003) ("[I]t is true that immaterial or technical defects in a notice of license suspension will not be grounds for reversing a suspension. *Department of Driver Licensing v. Sutton*, 541 Pa. 35, 660 A.2d 46 (1995) (one-day discrepancy as to date of refusal to take blood test is curable, technical defect); *Hatzai v. Department of Transportation, Bureau of Driver Licensing*, 686 A.2d 48 (Pa. Cmwlth. 1996) (incorrect citation to vehicle code, instead of controlled substances act, was immaterial error when notice stated correct date of conviction for single offense). In contrast, this case presents a rare and egregious combination of incorrect dates of both violations and convictions and a seven-year delay in issuing notices of suspension, not all of which, however, may be chargeable to the Department. Moreover, this case is not one in which the relevant notices contained minor, technical errors. *See Harrington v. Department of Transportation, Bureau of Driver Licensing*, 563 Pa. 565, 763 A.2d 386 (2000) (failure of New Jersey report and Pennsylvania suspension notice to note driver's plea or whether conviction resulted from forfeiture of security did not violate due process when notice correctly reference the conviction and its date and notified driver of equivalent DUI provision and statutory authority for suspending his license).").

REASONS RELIED ON FOR ALLOWANCE OF APPEAL

This case presents, in simplest form, the most basic and compelling reason for this Honorable Court to allow appeal: Petitioner was denied due process of law, as guaranteed by the United States Constitution. Should this Court not allow review, that wrongful deprivation will not be corrected.

RESPECTFULLY SUBMITTED:

Allen C. Welch, Esquire
Counsel of Record
1101 North Front Street
Harrisburg, PA 17102
(717)-350-1002

APPENDIX

Page

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DENNIS L. RODRIGUEZ,	:	No. 1100 MAL 2004
	:	
Petitioner	:	
	:	Petition for Allowance of Appeal
	:	From the Order of the
	:	Commonwealth Court
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPT. OF	:	
TRANSPORTATION,	:	
BUREAU OF DRIVER	:	
LICENSING	:	
Respondent	:	

ORDER

PER CURIUM

AND NOW, this 14th day of September, 2005, the Petition for Allowance of Appeal is hereby denied.

TRUE & CORRECT COPY
ATTEST: September 14,2004

/s/ Elizabeth Zisk
Elizabeth Zisk, Appellate Court Clerk

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENNIS L. RODRIGUEZ,	:	
	:	
Petitioner	:	
	:	No. 325 C.D. 2004
v.	:	SUBMITTED: July 16, 2004
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPT. OF TRANSPORTATION, BUREAU OF DRIVER LICENSING	:	

BEFORE:

HONORABLE BERNARD L. McGINLEY , Judge

HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY

JUDGE LEADBETTER FILED: November 8, 2004

Dennis L. Rodriguez appeals from an order of the Court of Common Pleas of Dauphin County (common pleas) that dismissed his statutory appeal from the five-year revocation of his operating privilege and also dismissed his request for time credit due to lack of jurisdiction.

The facts of this case are simply stated. Rodriguez was arrested for Driving Under the Influence (DUI)[1] on February 8,

[1] Although formerly codified at Section 3731 of the Vehicle Code (Code), 75 Pa. C.S. 3731, the section of the statute prohibiting driving under the

1997, July 4, 1997, and July 6, 2001. He pled guilty to the 1997 offense on November 18, 1997. He apparently also pled guilty to the last offense on April 8, 2002, but common pleas granted his motion to withdraw his plea, and he again pled guilty to this offense on January 13, 2003. Due to his convictions, the Department of Transportation, Bureau of Driver Licensing (Department) mailed Rodriguez, on May 3, 2002, an official notice of revocation pursuant to Section 1542(d) of the Code, 75 Pa. C.S. 1542(d).[2] This notice informed Rodriguez of his designation as a habitual offender and that his driving privilege was being revoked for a five-year period beginning December 5, 2001. It also provided that he was required by law to have all vehicles owned by him equipped with an ignition interlock system prior to restoration of his driving privilege.[3]

Thereafter, Rodriguez appealed to common pleas, which held a hearing *de novo*. Common pleas then dismissed Rodriguez's appeal on January 16, 2004, and Rodriguez filed a timely Notice of Appeal with this court. In his brief here, he argues that: (1) the Department did not prove that he was a habitual offender in accordance with 75 Pa. C.S. 1542; (2) the Department did not give him proper credit toward his license suspension; and (3) the Department improperly required him to obtain an ignition interlock device.[4]

---

influence of alcohol or a controlled substance can now be found at Section 3802 of the Code, 75 Pa. C.S. 3802.

[2] This section (relating to period of revocation) provides: "The operating privilege of any person found to be a habitual offender under the provisions of this section shall be revoked by the department for a period of five years."

[3] The Act that is commonly referred to as the Ignition Interlock Device Act was formerly codified at 42 Pa. C.S. 7001-7003. It was repealed effective Februay 1, 2004, by Act No. 2003-24. Prior to this repeal, our Supreme Court had severed certain portions of the Act that it deemed to be unconstitutional, including 42 Pa. C.S. 7002(b). *See Commonwealth v. Mockaitis*, 575 Pa. 5, 834 A.2d 488 (2003). The current version of the law can be found at 75 Pa. C.S. 3805.

[4] "When only questions of law are presented, our review of the habitual offender provisions of the Code is plenary." *Fetty v. Dep't of Transp., Bureau of Driver Licensing*, 784 A.2d 236, 239 n.8 (Pa. Cmwlth. 2001)

With respect to the initial question of whether the Department proved Rodriguez to be a habitual offender, Section 1542(a) of the Code, 75 Pa. C.S. 1542(a) provides:

> The department shall revoke the operating privilege of any person found to be a habitual offender pursuant to the provisions of this section. A "habitual offender" shall be any person whose driving record, as maintained by the department, shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b) committed after the effective date of this title and within any period of five years thereafter.

Section 1542(b) of the Code, 75 Pa. C.S. 1542(b), provides that for habitual offender status the requisite number of DUI convictions is three.

Although Rodriguez argues that the Department did not prove he was a habitual offender because it wrongly submitted evidence that he was last convicted of DUI in April 2002 rather than January 2003, we find this contention meritless.[5] The salient question is not whether Rodriguez's three DUI convictions occurred within five years of each other, but instead, "[f]or purposes of determining the five-year period under Section 1542 of the Vehicle Code, we look to the date that the licensee actually committed the violations, not the date of the convictions." *Ford v. Dep't of Transp., Bureau of Driver Licensing*, 776 A.2d 367, 368 n.3 (Pa. Cmwlth. 2001). Se also ." *Fetty v. Dep't of Transp., Bureau of Driver Licensing*, 784 A.2d 236, 240 (Pa. Cmwlth. 2001) (stating that "the Department bears the burden of demonstrating that licensee's certified driving record contains the requisite number of convictions *for offenses committed within a five-year period* to satisfy the habitual offender provisions of the Code.)(Emphasis added). Here the Department met its burden by introducing certified copies of Rodriguez's convictions for DUI offenses

---

[5] Moreover, this court noted in *Richards v. Dep't of Transp, Bureau of Driver Licensing*, 767 A.2d 1133 (Pa. Cmwlth.2001), that the Department's entry into evidence of a certified record containing an incorrect date of conviction is a minor error that will not in and of itself justify overturning a license suspension.

committed on February 8, 1997, July 4, 1997, and July 6, 2001, all within a five-year span of time. Therefore, we reject Rodriguez's assertion that the Department failed to prove that he was a habitual DUI offender under section 1542 of the Code.

Rodriguez next argues that common pleas should have given him time credit toward his license revocation because he has not driven for a period of 21 months and 23 days in accordance with a December 4, 2001, court order stating that he was not to drive until his case was settled. However, in *Xenakis v. Dep't of Transp., Bureau of Driver Licensing*, 702 A.2d 572, 575 (Pa. Cmwlth. 1997) we stated that "[t]he trial court may not credit a licensee's suspension for time

served because DOT is better able to determine issues of credit, and its determinations are ultimately appealable to this Court." See also *Dep't of Transp., Bureau of Traffic Safety v. Yarbinitz*, 508 A.2d 641, 642 (Pa. Cmwlth. 1986) (stating that "for purposes of a license suspension appeal, a trial court lacks the authority to compute and give credit for any time that DOT may have been in possession of an operator's license.") Therefore, we reject Rodriguez's argument that common pleas erred in failing to award him administrative credit.

Last, Rodriguez contends that the Department wrongly required him to obtain an ignition interlock system prior to restoration of his driver's license. We agree. The law is now settled that pursuant to the original version of the Act, the Department may not require repeat DUI offenders to obtain interlock devices; rather, its "power is limited to issuing restricted licenses." *Delaney v. Dep't of Transp., Bureau of Driver Licensing*, 849 A.2d 300, 302 n.2 (Pa. Cmnwth. 2004). See also *See Commonwealth v. Mockaitis*, 575 Pa. 5, 834 A.2d 488 (2003); *Cinquina v. Dep't of Transp., Bureau of Driver Licensing*, 840 A.2d 525 (Pa. Cmnwth. 2004). Moreover, although the General Assembly in its recent amendment to the Act gave the Department independent authority to to require a repeat offender to install an approved ignition interlock device, that amendment "by its terms only applies when a second or subsequent DUI violation occurs after September 30, 2003[.]"[6] *Cinquina*, 840 A.2d at 527 n.6. Thus, that amendment has no applicability here. We therefore agree with Rodriguez that the Department acted outside its authority in requiring him to install an interlock system in any vehicle owned by him prior to restoration of his operating privilege.

---

[6] Specifically, Act No. 2003-24 amended 42 Pa. C.S. 7002(b) prior to its being struck as unconstitutional by our Supreme Court in *Mockaitis*. That amendment, which was not considered by the *Mackaitis* Court, states:

> If a second or subsequent violation of 75 Pa. C.S. 3731 occurs after September 30, 2003, a court's failure to enter an order in compliance with this subsection shall not prevent the department from requiring, and the department shall require, the person to install an approved ignition interlock device in accordance with this chapter.

Accordingly, we reverse common pleas only to the extent that it upheld the Department's requirement that Rodriguez install an ignition interlock device on any vehicles owned by him as a predicate to restoration of his operating privilege. We affirm common pleas' order in all other respects.

BONNIE BRIGANCE LEADBETTER,

JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENNIS L. RODRIGUEZ,	:	
	:	
Petitioner	:	
	:	No. 325 C.D. 2004
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPT. OF TRANSPORTATION, BUREAU OF DRIVER LICENSING	:	

ORDER

AND NOW, this 8th day of November, 2004, the order of the Court of Common Pleas of Dauphin County in the above-captioned matter is hereby AFFIRMED IN PART an REVERSED IN PART. The order is REVERSED to the extent that it upheld the Department's requirement that Rodriguez install an ignition interlock device on any vehicles owned by him as a predicate to restoration of his operating privilege, but WITHOUT PREJUDICE to the Department's obligation to restore only an interlock restricted license. We AFFIRM common pleas' order in all other respects.

BONNIE BRIGANCE LEADBETTER,
JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENNIS L. RODRIGUEZ,	:	
	:	
Petitioner	:	
	:	No. 325 C.D. 2004
v.	:	SUBMITTD: July 16, 2004
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPT. OF TRANSPORTATION, BUREAU OF DRIVER LICENSING	:	

BEFORE:

HONORABLE BERNARD L. McGINLEY , Judge

HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION BY

SENIOR JUDGE KELLEY FILED: November 8, 2004

I respectfully dissent.

On February 8, 1997 and July 4, 1997, Rodriguez was charged with driving while under the influence of alcohol (DUI) in violation of section 3731 of the Vehicle Code, 75 Pa. C.S. 3731. On November 18, 1998, Rodriguez pleaded guilty to both of the offenses. As a result, on December 15, 1997, the Department sent Rodriguez two notices suspending his driving privilege for one year.

On July 6, 2001, Rodriguez was again charged with DUI. On April 8, 2002, Rodriguez pleaded guilty to the charge. On May 3, 2002, the Department sent Rodriguez a notice which stated that, pursuant to Section 1542 of the Vehicle Code[7], he had been designated as a habitual offender based on the three DUI offenses that had occurred within a five-year period. The notice also stated that Rodriguez's driving privilege was revoked for a five-year period effective December 5, 2001.

On August 29, 2002, the trial court issued an order granting Rodriguez's petition to withdraw his guilty plea of April 8, 2002. On January 13, 2003, Rodriguez again pleaded guilty to the DUI charge of July 6, 2001. On July 24, 2003, the department again sent Rodriguez a notice which stated that he had been designated as a habitual offender based on the three DUI offenses that had occurred within a five-year period, and that his driving privilege was again revoked for a five-year period. On August 20, 2003, Rodriguez filed the instant appeal from the department's suspension notice of July 24, 2003.

On November 26, 2003, a hearing was conducted before the trial court on his appeal. At the hearing, and in support of the suspension, the department entered into evidence a packet of documents certified by its Secretary. See N.T. 11/26/03[8] at 7. The packet contained certified photostatic copies of the following

---

7 Section 1542 of the Vehicle Code provides, in pertinent part:

> **(a) General rule.**-The department shall revoke the operating privilege of any person found to be a habitual offender pursuant to the provisions of this section. A "habitual offender"shall be any person whose driving record, as maintained in the department, shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b) committed after the effective date of this title and within any period of five years thereafter.
>
> * * *
>
> **(c) Period of revocation.**-The operating privilege of any person found to be a habitual offender under the provisions of this section shall be revoked by the department or a period of five years.

8 "N.T. 11/26/03" refers to the transcript of the hearing conducted before the trial court on November 26, 2003.

documents: (1) the Department's notice of suspension dated May 3, 2002, which indicated that Rodriguez's driving privilege had been revoked for a five-year period effective December 5, 2001; (2) the report of the Clerk of Courts of Dauphin County showing Rodriguez's DUI conviction of April 8, 2002; (3) the Department's notices of suspension dated December 15, 1997 which indicated that Rodriguez's driving privilege had been suspended for one year effective January 19, 1998; (4) the reports of the Clerk of Courts of Dauphin County showing Rodriguez's DUI convictions of November 18, 1997; (5) the report of the Clerk of Court of Dauphin County showing the accelerated rehabilitative disposition (ARD) of a charge dated October 3, 1989; (6) the Department's notices of suspension dated October 26, 1989 which indicated that Rodriguez's driving privilege had been suspended for three months effective October 3, 1989; and (7) the Department's certified driving history for Rodriguez which was dated June 10, 2002. See Commonwealth Exhibit #1.

Thus, in the instant case, the Department failed to introduce into evidence a certified copy of the revocation notice of July 24, 2003, underlying the appeal, and a certified copy of the conviction of January 13, 2003 supporting the revocation of Rodriguez's driving privilege. Clearly, by failing to offer either a certified copy of the revocation notice itself or *any* evidence of a conviction supporting the revocation of Rodriguez's driving privilege, the Department failed to sustain its burden of proof in this case. See, e.g., Fetty v. Dep't of Transp., Bureau of Driver Licensing, 784 A.2d 236, 240 (Pa. Cmwlth. 2001) ("[A]s an initial matter, we. Note that the Department bers the burden of demonstrating that Licensee's certified driving record contains the requisite number of convictions for offenses committed within a five-year period to satisfy the habitual offender provisions of the [Vehicle] Code. See generally Martino v. Commonwealth, [541 A.2d 425 (Pa. Cmwlth. 1988)].").[9]

[9] In Footnote 5 of its opinion, the Majority acknowledges that the Department offered a certified driving record containing the incorrect date of conviction, but that this was a minor error which would not justify the overturning of the instant license revocation. However, in doing so, the majority fails to apprehend that the Department failed to offer the correct notice of revocation underlying the appeal itself, and any evidence of the conviction supporting that revocation. The certified copy of the notice of revocation of May 3,

More importantly, even if it is assumed that the Department met its burden of proof in this regard, both the certified copy of the notice of the notice of revocation and the copy of Rodriguez's driving record that were admitted into evidence clearly and explicitly state that the five-year revocation was to be effective December 5, 2001.[10] See Commonwealth Exhibit #1. Thus, in his appeal, Rodriguez was not asking the trial court to recalculate the revocation period imposed by the Department. Rather, in his

---

2002, and certified copy of the conviction of April 8, 2002, that were offered by the Department at the hearing were, at that point, null and void as Rodriguez had withdrawn his guilty plea, entered a new guilty plea on January 13, 2003, and the Department had issued a new revocation notice of July 24, 2003 which was the subject of the appeal. To my mind, such an omission on the Department's part implicates the fundamental guarantee of due process and can never be deemed to be a "minor error." See, e.g., Dunn v. Department of Transportation, 819 A.2d 189, 192-193 (Pa. Cmwlth. 2003) ("[I]t is true that immaterial or technical defects in a notice of license suspension will not be grounds for reversing a suspension. *Department of Driver Licensing v. Sutton*, 541 Pa. 35, 660 A.2d 46 (1995) (one-day discrepancy as to date of refusal to take blood test is curable, technical defect); *Hatzai v. Department of Transportation, Bureau of Driver Licensing*, 686 A.2d 48 (Pa. Cmwlth. 1996) (incorrect citation to vehicle code, instead of controlled substances act, was immaterial error when notice stated correct date of conviction for single offense). In contrast, this case presents a rare and egregious combination of incorrect dates of both violations and convictions and a seven-year delay in issuing notices of suspension, not all of which, however, may be chargeable to the Department. Moreover, this case is not one in which the relevant notices contained minor, technical errors. *See Harrington v. Department of Transportation, Bureau of Driver Licensing*, 563 Pa. 565, 763 A.2d 386 (2000) (failure of New Jersey report and Pennsylvania suspension notice to note driver's plea or whether conviction resulted from forfeiture of security did not violate due process when notice correctly reference the conviction and its date and notified driver of equivalent DUI provision and statutory authority for suspending his license).").

[10] It should be noted that, at the hearing before the trial court, counsel for the Department stated that Rodriguez's driving privilege had been restored on June 13, 2002 after it had been revoked effective December 5, 2001. See N.T. 11/26/03 at 10-12. However, the certified documents offered by the Department, and entered into evidence, contain no such information. See Commonwealth Exhibit #1. Rather, a certified notice of revocation, and the certified driving record, merely indicate the Rodriguez's driving privilege had been revoked by the Department for a five-year period and that the revocation was effective December 5, 2001. Id.

appeal, Rodriguez was merely asking the trial court to compel the Department to comply with the revocation period that it imposed as reflected in its records. The trial court clearly possessed jurisdiction in such a case, and the court erred in concluding otherwise.[11]

---

[11] See, e.g., Waite v. Department of Transportation, 834 Pa. 1218, 1221 (Pa. Cmwlth. 2003) ([I]n this instance, the common pleas court originally determined that an error had been made in determining the date Waite surrendered his license to the court and when each suspension period should begin. The common pleas court ordered that error be corrected. DOT ignored that finding and made its own determination as to when the suspension should run. Moreover, DOT did not appeal the common pleas court's determination. If DOT wanted to challenge the period of suspension, it should have appealed the original order instead of collaterally attacking the common pleas court's decision to enforce its original order . . . [H]ere, the common pleas court correctly noted it enjoyed subject matter jurisdiction because Waite challenged whether DOT acted in accordance with law when it failed to treat each suspension period as beginning the day that he surrendered his license to the common pleas court. The common pleas court accurately perceived that Waite did not request a recalculation of his suspensions."); Ladd v. Department of Transportation, 753 A.2d 318, 321-322 (Pa. Cmwlth. 2000) ("[T]he trial court misperceived Licensee's argument. Licensee was not requesting that the trial court recalculate his driving record. Instead, Licensee was seeking an adjudication that DOT failed to act according to the law after DOT removed Licensee from habitual offender status. According to Licensee, once DOT removed Licensee from habitual offender status, DOT could properly impose only three one-year suspensions as a result of his section 1543 convictions; thus, Licensee asserted tat DOT sentenced him in violation of the law when it imposed three two-year revocations. That issue was properly held before the trial court. And the trial court erred in holding otherwise.").

Accordingly, unlike the majority, I would reverse the trial court's order in all respects.

/s/ JAMES R. KELLEY

Senior Judge

DENNIS L. RODRIGUEZ,	:	IN THE COURT OF COMMON
	:	PLEAS OF DAUPHIN COUNTY
Petitioner	:	PENNSYLVANIA
	:	
	:	
	:	NO. 2003 CV 3627 LS
COMMONWEALTH OF PENNSYLVANIA, DEPT. OF TRANSPORTATION, BUREAU OF DRIVER LICENSING	:	
	:	
	:	
	:	
Respondent	:	

MEMORANDUM PURSUANT TO Pa.R.A.P. 1925(b)

The Petitioner has appealed this court's order of January 16, 2004, dismissing his license suspension appeal. The issue on the license suspension appeal was whether the Petitioner was correctly adjudicated as a habitual offender under 75 Pa.C.S.A. 1542. Following the hearing before this court on November 26, 2003, we granted the Petitioner 30 days to file a brief in support of his argument that he is not a habitual offender within section 1542 and the Department of Transportation ("Department") had 10 days to file a response.

The petitioner argued at the hearing and in his brief that he is not a habitual offender since he was not convicted of the offense of DUI three times within a five year span as required by section 1542. The Department alleged that the three relevant DUI offenses occurred on February 8, 1997; July 4, 1997; and July 6, 2001.[1]

1 The petitioner has been arrested for DUI four times: March 3, 1989; February 8, 1997, July 4, 1997; and July 6, 2001. The first arrest in March of 1989 is not an issue in this case as it did not occur within five years of any other arrest or conviction.

The petitioner admits that he pled guilty to the first two occurrences on November 18, 1997.

The issue here is whether, for purposes of designating a defendant as a habitual offender under section 1542 of the Vehicle Code, the Department should consider the dates of the DUI *offense* or, on the other hand, the dates of the DUI *convictions*. In this case, the dates of commission of DUI all fall within a five-year period, but the dates of conviction do not. The petitioner pled guilty and was therefore convicted of the first two relevant charges on November 18, 1997. The petitioner first pled guilty to the third charge on April 8, 2002, but then moved to withdraw his guilty plea, and the honorable Scott Evans granted that motion on October 15, 2002. After subsequent proceedings, the petitioner again pled guilty to the third charge on January 1, 2003, more than five years after his first to convictions on November 18, 1997. According to Section 1542 f the Vehicle Code,

> A "habitual offender" shall be any person whose driving record, as maintained in the Department, shows that such person has accumulated a requisite number of convictions for the separate and distinct offense described and enumerated in subsection (b) committed after the effective date of this title and within any period of five years thereafter.

(emphasis added). It appears that the legislature intended the designation of a habitual offender is to be based upon convictions of offenses committed within a five-year period.

The Department argues that the actual conviction dates are separated by more than five years simply due to the litigation undertaken by Petitioner in connection with the third offense. If the court follows the Petitioner's logic, an individual could manipulate the appeals, court filing and litigation dates in order to delay actual conviction dates and avoid designation as a habitual offender. We agree with the Department that such an outcome is adverse to the spirit of the law and the legislative intent behind section 1542. In considering this very issue, the Commonwealth Court stated,

> [T]his court has previously stated that, for purposes of determining the five-year period under section 1542 of

> the Code, 75 Pa.C.S. 1542, we must look at the dates that the licensee actually committed the violations, not the dates of convictions.

Commonwealth of Pennsylvania Department of Transportation, Bureau of Driver Licensing v. Richardson, 167 Pa.Cmwlth.630, 648 A.2d 1308 (1994) *citing*, Sanders v. Department of Transportation, Bureau of Traffic Safety, 89 Pa.Cmwlth 609, 493 A.2d 794 (1985).

The Petitioner argues that the Richardson case is distinguishable from the instant case since that case involved four counts of driving without insurance, rather than DUI. We find this to be a distinction without difference. The Richardson court's language is clear, and it seems arbitrary to limit its applicability only to the offense of driving without insurance. We therefore dismiss the Petitioner's appeal.

BY THE COURT:

/s/ Bruce F. Bratton

Judge